No. 17-647

IN THE

Supreme Court of the United States

ROSE MARIE KNICK, *Petitioner*,

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE CATO INSTITUTE, NFIB SMALL BUSINESS LEGAL CENTER, SOUTHEASTERN LEGAL FOUNDATION, AND BEACON CENTER AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

This brief addresses the first question raised by the Petition:

Whether the Takings Clause state-litigation requirement—barring property owners from filing federal takings claims in federal court until they exhaust state court remedies, which comes from *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985)—should be reconsidered and ultimately abandoned as not only unworkable but an anomaly in fundamental-rights jurisprudence.

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INTEREST OF THE *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitols. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that affect small businesses.

Southeastern Legal Foundation (SLF) is a national nonprofit, public-interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts

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[1] Rule 37 statement: All parties received timely notice of *amici*'s intent to file this brief. All parties lodged blanket consents with the Clerk. No counsel for any party authored any part of this brief; no person or entity other than *amici* made a monetary contribution intended to fund its preparation or submission.

of law and public opinion. For 40 years, SLF has advocated for the protection of private property interests from unconstitutional takings.

The Beacon Center of Tennessee is a nonprofit organization based in Nashville, Tennessee that advocates for free-market policy solutions within Tennessee. Property rights and constitutional limits on government mandates are central to its goals.

This case is of significant concern to *amici* because it implicates the Fifth Amendment's protection of property rights against uncompensated takings.

INTRODUCTION AND SUMMARY OF ARGUMENT

Thirty years ago, in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), this Court pronounced a new and unfounded rule that a property owner must sue in state court to ripen a federal takings claim. This radical departure from historical practice has effectively shut property owners out of federal courts without any firm doctrinal justification. Worse—in a total miscarriage of justice—some courts apply *Williamson County* to deny access to *both* federal and state courts.

Property owners' lack of access to federal courts emboldens local governments to take aggressive, often unconstitutional regulatory action, knowing that a "final decision" can be delayed and that any practical challenge to state agency decisions must be brought in state courts, which will likely prove sympathetic to their fellow state officials. Before *Williamson County*, there was no requirement that property owners first resort to litigation to ripen their takings claims. Before the ratification of the Fourteenth Amendment, courts

played no role in the ripening of takings claims, and there is no basis for assuming that, through ratification, the Reconstruction Congress imposed any sort of litigation requirement on property owners seeking to ripen claims against state actors.

Williamson County's requirement is anathematic to the reforms that Congress sought to effect with the Reconstruction Amendments and enactment of U.S.C. § 1983. To curb pervasive abuse by state governments, the Fourteenth Amendment secured federal rights for all U.S. citizens. Congress enacted § 1983 to ensure that citizens would have a federal forum to vindicate their federal rights—precisely because there was concern that state courts could not be trusted to adequately enforce the federal Constitution against the coordinate branches of state government.

Williamson County's requirement to litigate in state court defeats the Reconstruction Congress's goal of opening the federal courthouse doors to citizens alleging violation of federal rights. This double standard cannot be justified on the ground that takings claims are "premature" before state court proceedings have run their extensive course, as claimed in *Williamson County*, 473 U.S. at 195–97. Any other constitutional rights case initiated in federal court is "premature" in exactly the same way—because there is always the chance that the plaintiff could have obtained redress in state court instead.

Similarly, it is dangerously misguided to justify this systematic exclusion from federal court by looking to the supposedly superior expertise of state judges on land-use issues. *See San Remo Hotel v. San Francisco*, 545 U.S. 323, 347 (2005). State judges could be said to have similar superior expertise on a variety of other

issues that arise in constitutional litigation, including ones relevant to other rights protected by the Bill of Rights. After all, they understand local sensibilities, histories, and other particularities that might be just as relevant in an obscenity, reasonable-expectations, or unusual-punishment context.

But the regime created by *Williamson County* effectively consigns Takings Clause claims to second-class status. No other individual constitutional rights claim is systematically excluded from federal court in the same way. Recognizing the indefensible nature of these anomalies, four justices have already called for the overruling of *Williamson County* "in an appropriate case." *San Remo Hotel*, 545 U.S. at 352 (Rehnquist, C.J., concurring).

That appropriate case has now arrived.

ARGUMENT

I. *WILLIAMSON COUNTY*'S STATE-LITIGATION REQUIREMENT MUST BE ABANDONED

In *Williamson County*, the Court, reasoning that a Takings Clause claim could not proceed in federal court until it was "ripe," establishing two conditions that had to be met before a federal court could hear the case. "The government entity charged with implementing the regulations [must have] reached a final decision regarding the application of the regulation to the property at issue," 473 U.S. at 186, and the claimant must have sought "compensation through the procedures the State has provided for doing so." *Id.* at 194. Thus, "if a State provides an adequate procedure for seeking just compensation the property owner cannot claim a violation of the Just

Compensation Clause until it has used that procedure and been denied just compensation." *Id.* at 195. However reasonable this requirement seemed at its adoption, it has proven to do more harm than good.

This Court has said that "[t]he obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992). Therefore, "the rule of stare decisis is not an 'inexorable command,' and certainly it is not such in every constitutional case." *Id.* One reason for overruling precedent is when the rule has proven unworkable in practice. *Id.* Another is when changed circumstances—or the same circumstances differently viewed—establish that the old rule cannot be justified. *Id.* at 855. This Court, and the courts below it, need not continue to apply a rule that promotes injustice in the name of *stare decisis*. *See Lawrence v. Texas*, 539 U.S. 558, 577–79 (2003). The state-litigation requirement only prevents people whose property has been taken from receiving the just compensation they are due under the Fifth Amendment. The rule should be abandoned "as unsound in principle and unworkable in practice." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

A. The State-Litigation Requirement Often Prevents Judicial Review of State- and Local-Government Takings

The obstacles *Williamson County* imposes on property owners wishing to assert a federal takings claim are well-known. The requirement that property owners first get a "final decision" from the relevant state agency, *Williamson County*, 473 U.S. at 186, can lead to protracted delay. *See Res. Invs., Inc. v. United*

States, 85 Fed. Cl. 447, 498 (2009) ("complicated permitting processes are rife with delays," citing cases, including *Williamson County*, showing that delays frequently range from sixteen months to eight years). But the worst irony of *Williamson County*'s state-litigation requirement is that the plaintiff who satisfies it has, in effect, lost the right to proceed in federal court, because takings claims—once litigated to completion in state court—cannot be re-litigated. Some combination of general principles of res judicata, issue preclusion, the federal full-faith-and-credit statute, 28 U.S.C. § 1738, and possibly the *Rooker-Feldman* doctrine, doom any effort to obtain federal judicial review of a federal constitutional claim once it has been litigated in state court. *See San Remo Hotel*, 545 U.S. at 351 (Rehnquist, C.J., concurring).[2] This anomalous state of affairs led Chief Justice Rehnquist to urge the Court to re-examine *Williamson County*. Joined by Justices O'Connor, Kennedy, and Thomas, the chief justice wrote:

> I joined the opinion of the Court in *Williamson County*. But further reflection and experience lead me to think that the justifications for its state-litigation requirement are suspect, while its impact on takings plaintiffs is dramatic. . . . I believe the Court should reconsider whether plaintiffs asserting a Fifth Amendment takings claim based on the final decision of a state or

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[2] Chief Justice Rehnquist also observed that this effect of *Williamson County* was not limited to making the federal court unavailable for takings claims. He noted that some state courts have applied the state-litigation requirement to refuse to allow plaintiffs to litigate federal claims even in state court. *See San Remo Hotel*, 545 U.S. at 351 n.2 (Rehnquist, C.J., concurring).

> local government entity must first seek compensation in state courts.

Id. at 352. *See also Kottschade v. City of Rochester*, 319 F.3d 1038, 1041 (8th Cir. 2003) (recognizing that the "requirement that all state remedies be exhausted, and the barriers to federal jurisdiction presented by res judicata and collateral estoppel that may follow from this requirement, may be anomalous," but that it "is for the Supreme Court to [resolve], not us"). This is the appropriate case for that resolution.

B. Defendants Can Exploit the State-Remedies Rule to Deny Property Owners Both State and Federal Judicial Forums

Since *Williamson County* was decided, the state-litigation requirement has generated massive and recurrent legal confusion in the lower courts. Courts and commentators alike have virtually exhausted the resources of the English language in describing the difficulties *Williamson County* imposes on lower courts and its manifest unfairness to takings plaintiffs.[3] The exhaustion requirement provides recalcitrant state

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[3] *See* Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671, 702–03 (2004) (collecting descriptions such as "unfortunate," "ill-considered," "unclear and inexact," "bewildering," "worse than mere chaos," "misleading," "deceptive," "source of intense confusion," "inherently nonsensical," "shocking," "absurd," "unjust," "self-stultifying," "pernicious," "revolutionary," "draconian," "riddled with obfuscation and inconsistency," containing an "Alice in Wonderland quality" and creating "a procedural morass," "labyrinth," "havoc," "mess," "trap," "quagmire," "Kafkaesque maze," "a fraud or hoax on landowners," "a weapon of mass obstruction," "a Catch-22 for takings plaintiffs").

and local officials with a pre-approved roadmap to insulate their decisions from independent review. *Williamson County*, 473 U.S. at 196.

For example, the property owner in *Williamson County* was instructed that it should have utilized the inverse-condemnation procedure available under state law to ripen the takings claim. *Id.* This advice ignored the fact that inverse-condemnation claims never succeed where direct challenges to regulations have failed. Similarly, the *Williamson County* rule requires individual applicants to seek variances right after their zoning applications are denied, *see id.* at 191, even though the standards for obtaining variances are higher than those for the original zoning applications and are never granted in the absence of changed circumstances. *See, e.g.*, William Maker, Jr., *What Do Grapes and Federal Lawsuits Have in Common? Both Must Be Ripe*, 74 Alb. L. Rev. 819, 834 (2010–2011) ("Not only are the standards for a use variance different from the standards for site plan approval, they are much more stringent.").

At the very least *Williamson County* assumed that a property owner would have the opportunity to attain a decision in state court; an assumption that has proven wrong. The Court did not anticipate that *Williamson County* would be weaponized by government defendants looking to short-circuit takings claims brought in state court.

In *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997), this Court held that a takings claim, filed in state court, could be removed to federal court. *Id.* at 161. Governmental defendants have since removed takings cases to federal court based on federal-question jurisdiction. Then—with all the

chutzpah that can be mustered—they have sought dismissal asserting that the federal takings claim is unripe because there has been no state court decision, as required by *Williamson County*. *See* J. David Breemer, *The Rebirth of Federal Takings Review? The Courts' "Prudential" Answer to* Williamson County's *Flawed State Litigation Ripeness Requirement*, 30 Touro L. Rev. 319, 334 n.78 (2014).

Some courts don't buy this tactic.[4] But many do.[5] Consequently, many takings plaintiffs are unable to complete the *Williamson County* state remedies requirement and may be barred from filing a second suit by the statute of limitations—or otherwise forced to exhaust their legal budget on these procedural games. *Cf. Martin v. Franklin Capital Corp.*, 546 U.S. 132 (2005) ("The process of removing a case to federal court and then having it remanded back to state court delays resolution of the case, imposes additional costs on both parties, and wastes judicial resources.").

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[4] *See*, e.g., *Yamagowa v. City of Half Moon Bay*, 523 F. Supp. 2d 1036, 1110 (N.D. Cal. 2007) (city removed case to federal court, and on the eve of trial sought remand under *Williamson County*; court rejected the argument, concluding "the City having invoked federal jurisdiction, its effort to multiply these proceedings by a remand to state court smacks of bad faith.").

[5] *See Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 625 (5th Cir. 2003); *Koscielski v. City of Minneapolis*, 435 F.3d 898, 903–04 (8th Cir. 2006); *Ohad Assocs., LLC v. Twp. Of Marlboro*, Civil No. 10-2183 (AET), 2011 U.S. Dist. LEXIS 8414, at *3, 6-8 (D.N.J. Jan. 28, 2011); 8679 *Trout, LLC v. N. Tahoe Pub. Utils. Dist.*, No. 2:10-cv-01569-MCE-EFB, 2010 U.S. Dist. LEXIS 93303, at *4, 13–14 (E.D. Cal., Sept. 8, 2010); *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173, 1174–75 (D. Kan. 1999); *see also Del-Prarier Stock Farm, Inc. v. Cnty. of Walworth*, 572 F. Supp. 2d 1031, 1034 (E.D. Wis. 2008).

II. THERE IS NO DOCTRINAL BASIS FOR THE STATE-REMEDIES RULE

Ironically, "the very procedure that [*Williamson County*] require[s] [plaintiffs] to follow before bringing a Fifth Amendment takings claim . . . also preclude[s] [them] from ever bringing a Fifth Amendment takings claim." *Santini v. Conn. Hazardous Waste Mgmt. Service*, 342 F.3d 118, 130 (2003). This is absurd. If a takings claim only ripens with a state court decision denying just compensation, then the protections of the Fourteenth Amendment are rendered illusionary and unenforceable as there is no available remedy. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 330–31, 347–48 (1816) (ruling lower federal courts must be authorized to hear cases concerning "all subjects within the purview of the constitution."). This rule contravenes the very purpose of the Fourteenth Amendment in affording protections for federal rights against the states, and the fundamental premise of our constitutional system—entailed in the maxim that "For every right, there must be a remedy." Sir William Blackstone, 1 William Blackstone, Commentaries On The Laws of England, 137 (Oxford, Clarendon Press 1765-1769) (commenting on Chapter 29 of Magna Carta: "A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries.") (alteration of original).

A. *Williamson County* Pronounced a New and Unfounded Ripeness Rule for Takings Claims

This Court holds that the requirements for Article III standing are satisfied once a litigant shows that there is a live case or controversy concerning a question of federal law. *See Warth v. Seldin*, 422 U.S.

490, 500 (1975) (emphasizing standing "in no way depends on the merits."). *Williamson County* assumes that special ripeness rules apply in the context of a takings claim.[6] Specifically, the opinion construed the words of the Takings Clause as imposing a requirement to pursue "just compensation" in state court to ripen a takings claim against a state actor.

If the Fifth Amendment required individuals to seek compensation in court, that requirement would seemingly apply equally to claims against state and federal actors. Indeed, there is no basis for assuming a different standard for ripening takings claims against state and local entities than against the United States. The text of the Fifth Amendment certainly imposes no such requirement. For that matter, its prohibition was originally directed only *against the federal government*. *See Barron v. City of Baltimore*, 32 U.S. 243, 250–51 (1833).

The Fourteenth Amendment imposed no special ripening requirement. Incorporation doctrine does not alter the nature of the constitutional protections secured in the Bill of Rights; it simply makes constitutional guarantees applicable against the states as against the federal government. *McDonald v. City of Chicago*, 561 U.S. 742, 765 (2010). Any special ripening requirement would have to be derived from the text of the Fifth Amendment, which would necessarily make that requirement equally applicable

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[6] And worse, some courts extend *Williamson County's* state litigation requirement to due process claims. *See, e.g., Kurtz v. Verizon New York, Inc.*, 758 F.3d 506, 515 (2d Cir. 2014) *cert. denied* (2015); *B. Willis, C.P.A., Inc. v. BNSF Ry. Corp.*, 531 F.3d 1282, 1299 n. 19 (10th Cir. 2008); *Greenfield Mills, Inc. v. Macklin*, 361 F.3d 934, 961 (7th Cir. 2004).

to claims against the United States. *Cf.*, John D. Echeverria, Stop the Beach Renourishment: *Why the Judiciary is Different*, 35 Vt. L. Rev. 475, 489 (2010) ("If the judicial branch of state government is subject to the Takings Clause, which applies to the states via incorporation through the Fourteenth Amendment, then the judicial branch of the federal government must also be subject to the Takings Clause.").

It would be nonsensical to say that a property owner must litigate a claim for just compensation in order to ripen a takings claim against the federal government. The rule is circular. The Takings Clause does not entail any requirement to ripen a takings claim in court. *See Monongahela Navigation Co. v. United States*, 13 S. Ct. 37 (1893) (emphasizing that the question of whether just compensation has been denied by an Act of Congress is a "judicial . . . question."); *see also Hunter's Lessee*, 14 U.S. at 330–31.

Moreover, the courts played no role in the ripening of takings claims in the 19th century. *See e.g., Kennedy v. Indianapolis*, 103 U.S. 599, 601 (1880) (recognizing a "controversy" as to whether just compensation had been paid under Indiana's Takings Clause, which was essentially identical to the Fifth Amendment); *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 176-77 (1871) (assuming a ripened controversy when interpreting Wisconsin's Takings Clause, which was nearly identical to the Fifth Amendment). Prior to *Williamson County*, the courts understood takings claims to be properly raised if (a) the owner's property had been taken by legislative or executive action, (b) without affording a contemporaneous administrative avenue for obtaining the compensation guaranteed by the Constitution. *See e.g., Cherokee Nation v. S. Kan.*

Ry. Co., 135 U.S. 641, 667–68 (1890) (case proceeded to federal court after the Cherokee Nation refused to accept an offer of compensation deemed adequate by the Executive Branch). This was true for both claims asserting a violation of the Fifth Amendment and equivalent claims raised under state takings clauses. *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 60–61 (1999) (explaining that, prior to the Civil War, courts recognized actionable claims in challenge to legislative enactments purportedly authorizing takings in the absence of any statutorily defined administrative procedure for obtaining compensation).

B. The Fourteenth Amendment and § 1983 Conferred Federal Protections for Property Rights—Including the Right to a Federal Judicial Forum—on the Same Terms as Other Fundamental Rights

The Fourteenth Amendment prohibits state actions that deprive individuals of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. It would be truly strange if one of the three rights explicitly listed in the text was not ensured any means of protection in federal court. It would be inconceivable that either life or liberty would be left unprotected, without opportunity for aggrieved individuals to vindicate their rights in federal court. The same must be true for property—which the Fourteenth Amendment protects on equal terms.

The need to protect property rights against abusive state and local governments was one of the main purposes behind the enactment of the Fourteenth Amendment. Advocates feared that southern state

governments threatened the property rights of African-Americans and other political minorities, including whites who had supported the Union against the Confederacy during the Civil War. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 268–69 (1998); *see also* Ilya Somin, The Civil Rights Implications of Eminent Domain Abuse, Testimony before the U.S. Comm'n on Civil Rights, 5-11 (Aug. 12, 2011) (explaining that minorities suffer disproportionately in the absence of strong property right protections).[7] The right to private property was a central component of the "civil rights" that the framers of the Fourteenth Amendment sought to protect.[8] "Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil liberties which the Amendment was intended to guarantee." *Shelly v. Kraemer*, 334 U.S. 1, 10 (1948).

The need to seek redress in a federal judicial forum was viewed as especially important for vindication of these rights. The Reconstruction Congress was not concerned only with the possibility of abuse at the hands of the legislature and executive branches of state government, *See Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982), but with abuses that may be pervasive and systemic—throughout all coordinate branches of

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[7] Available at http://bit.ly/2jBpR10 (last visited Nov. 28, 2017).

[8] On the centrality of property rights in 19th-century conceptions of civil rights, *see, e.g.*, Harold Hyman & William Wiecek, *Equal Justice Under Law: Constitutional Development*, 1835-75, 395–97 (1982) (describing the right to property as one of the main elements of civil rights as conceived in the 1860s); Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (1991) (describing how most 19th-century jurists viewed property as a fundamental right).

state government. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972); *Stop the Beach Renourishment v. Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 713–14 (2010) (affirming that the Takings Clause applies on equal terms to all branches of state government). There was special skepticism as to whether state courts could be trusted to vindicate federal rights against abuse—especially for African Americans recently freed from slavery. *See Mitchum v. Foster*, 407 U.S. 225, 242 (1972); Ilya Somin, Stop the Beach Renourishment *and the Problem of Judicial Takings*, 6 Duke J. Const. L. & Pub. Pol'y 92, 101–03 (2011) (observing that state court judges are sometimes influenced by political pressure—especially those who are elected, or appointed by a politically motivated coalition). Responding to continued abuses, in which state courts were complicit, the Reconstruction Congress enacted U.S.C. § 1983 to ensure that the federal court house doors would be open for any individual seeking vindication of federal rights. *See Briscoe v. Lahue*, 460 U.S. 325, 363–64 (1983) (noting that "[t]he debates over the 1871 Act are replete with hostile comments directed as state judicial systems."). Against this historical backdrop, there is no reason to assume that Congress intended to exclude takings claimants from vindicating their federal rights in federal courts. *Cf. San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J., concurring) (suggesting that owners should be allowed to initiate takings suits in federal court against state actors under Section 1983).

C. Federal Judicial Review of Federal Constitutional Claims Is Vital to the Uniform Protection of Fundamental Rights

In its landmark 1816 decision, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), this Court outlined two crucial reasons why it is imperative that federal judicial review be available for all constitutional claims: (1) the need for uniformity, and (2) the danger that state courts will fail to vindicate federal rights against their own state. Justice Joseph Story stressed "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Id.* at 347–48 (Story, J.) (emphasis in original). If 50 different state judiciaries address takings claims with only the remote possibility of federal review, that uniformity is unlikely to arise:

> Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable.

Id. at 348.[9]

Justice Story's concern has proven prescient; states differ greatly in the extent of protection they provide for takings claims. *See* Kirk Emerson & Charles R. Wise, *Statutory Approaches to Regulatory Takings: State Property Rights Legislation Issues and Implications for Public Administration*, 57 Pub. Admin. Rev. 411 (1997) (describing state standards).

In *Martin*, Justice Story also emphasized that federal review is essential because state courts might be unduly partial to the interests of their own states:

> The constitution has presumed . . . that state attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals.

Martin, 14 U.S. at 346–47.

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[9] Although *Martin* addressed the need for federal appellate review of state decisions on federal issues, the same concern also necessitates an avenue for aggrieved parties to file federal constitutional claims in federal district courts. When Takings Clause claimants must file in state court and appeal unfavorable decisions up through the state-court system, there cannot be any federal review at all, except in the rare Supreme Court case.

Such "state prejudices" and "state interests" are particularly likely to exert a pernicious effect when state courts are asked to require state and local governments to pay compensation for violations of the Takings Clause. State judges, many of whom are elected, often have close connections to the political leaders who control state policy. *See* Ilya Somin, Stop the Beach Renourishment, *supra*, at 99–100. While conscientious judges will surely try to rule impartially, their political and institutional loyalties could easily influence their decisions, consciously or not. Moreover, state officials might deliberately seek judges more inclined to rebuff federal claims that threaten state government interests. *Id.* at 99. Such dangers make a federal forum for ensuring the protection of constitutional rights essential.

D. The State-Litigation Rule Unjustifiably Consigns Takings Clause Claims to Second-Class Status when Compared with Other Fundamental Rights

No other constitutional right receives the same belittling treatment the Takings Clause received in *Williamson County*. Plaintiffs alleging state violations of virtually any other constitutional right can take their claims straight to federal court. This is true of rights guaranteed in the First Amendment, Second Amendment, and throughout the Bill of Rights. *See, e.g.*, *McDonald v. City of Chi.*, 561 U.S. 742 (2010) (Second Amendment); *Thomas v. Chi. Park Dist.*, 534 U.S. 316 (2002) (First Amendment); *Hudson v. McMillian*, 503 U.S. 1 (1992) (Eighth Amendment). The same rationale famously applies to rights protected by the Fourteenth Amendment, including

unenumerated rights. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973); *Brown v. Bd. of Educ.*, 347 U.S. 54 (1954).[10]

No other type of federal right is systematically barred from federal court, forcing litigants to file claims in the courts of the very state government that committed the violation. The result is an indefensible double standard. As the Court has emphasized, there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

The Court has suggested two justifications for its anomalous treatment of Takings Clause claims. First, that a plaintiff's claim that his property has been taken is "premature" before he has exhausted state compensation "procedures." *Williamson County*, 473 U.S. at 195–97. Second, that state courts have greater familiarity with takings issues than federal courts do. *See San Remo Hotel*, 545 U.S. at 347 ("[S]tate courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations."). These rationales cannot withstand scrutiny. If applied to suits asserting violations of

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[10] It would be inconceivable to require people seeking vindication of Fourteenth Amendment rights to sue in state court if Texas decided to reinstitute a poll tax, or if Illinois decided to deny equal apportionment of legislative districts. Similarly, this Court would never tolerate a requirement to seek redress in state court for alleged violations of the Equal Protection Clause if, for example, Georgia enacts a law prohibiting Muslims from holding public office, or if Mississippi should enact a law imposing heightened sentencing requirements on African Americans, or if officials in Iowa should refuse to issue marriage licenses to same-sex couples.

other rights, they would lead to the exclusion of numerous cases that federal courts routinely hear.

1. Federal court consideration of Takings Clause claims is no more "premature" than their consideration of other constitutional claims.

Under *Williamson County*, a federal claim against a state government for an uncompensated taking is "premature" until the owner has tried to obtain compensation "through the procedures the state has provided for doing so," including litigation in state court. *Williamson County*, 473 U.S. at 194. This reasoning can be used to justify denial of a federal venue for any other constitutional rights claim.

Under *Williamson County*'s reasoning, a claim that a state statute that infringed on a plaintiff's First Amendment right to free speech could be "premature" until she has asked a state court to invalidate the statute that gave rise to the violation. Yet no one suggests that such claims must reach a "final decision" in state court before any federal court can step in. Even if a state court claim might potentially remedy the violation of federal rights, a violation giving rise to a federal cause of action has still occurred. Similarly, that a state court might remedy a Takings Clause violation by providing compensation does not negate the violation—which is complete when the government takes the property without just compensation.

2. State courts have no greater expertise with Takings Clause claims than with numerous other constitutional claims that federal courts routinely hear.

The "expertise" rationale for *Williamson County*'s rule fares no better. State judges *may* know more than federal judges about "complex factual, technical, and legal questions related to zoning and land-use regulations," but the same can be said of issues that arise in many cases involving other constitutional rights. *See* Ilya Somin, *Federalism and Property Rights*, 2011 U. Chi. Legal Forum 1, 28–31 (giving numerous examples). This possibility has never been sufficient to deny a plaintiff access to federal review.

For example, some Establishment Clause claims require a determination of whether a "reasonable observer . . . aware of the history and context of the community and forum in which [the conduct occurred]" would view the practice as communicating a message of government endorsement or disapproval of religion. *Capitol Square v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring). State judges may have more detailed knowledge of their community's perceptions than federal judges, but that does not stop aggrieved parties from bringing Establishment Clause cases to federal court.[11]

Similarly, this Court has ruled that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such

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[11] Of course, federal district judges also live in the communities where they preside—they don't exist in some federal ether—and, as leading citizens, may be even better perceive local goings-on.

advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Whether any given speech is likely to incite "imminent lawless action" may well depend on variations in local conditions. Although state judges may be best informed about such conditions, free-speech claims are not consigned to state courts.

As Chief Justice Rehnquist noted in *San Remo Hotel*, "the Court has not explained why we should hand authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings, while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment or the Equal Protection Clause." 545 U.S. at 350–51 (Rehnquist, C.J., concurring).

Furthermore, there is no reason to assume that state judges necessarily have greater knowledge of Takings Clause and other property-rights issues than federal judges do. They may have greater knowledge of local conditions and regulations, but on the other hand federal judges may have greater knowledge of relevant federal jurisprudence. Somin, Stop the Beach Renourishment, *supra*, at 102–03. Ultimately, this rationale does not provide a principled reason to prevent federal courts from hearing this single type of constitutional claim.

The right to vindicate federally secured rights is held sacrosanct in all other contexts. Yet without any real explanation, *Williamson County* has relegated the right to receive "just compensation" for the taking of

one's property to the status of an unprotected right—despite its explicit protection in constitutional text.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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